THE CULVERTS CASE INJUNCTION

House Transportation Committee
Work Session on Fish Passage Barriers
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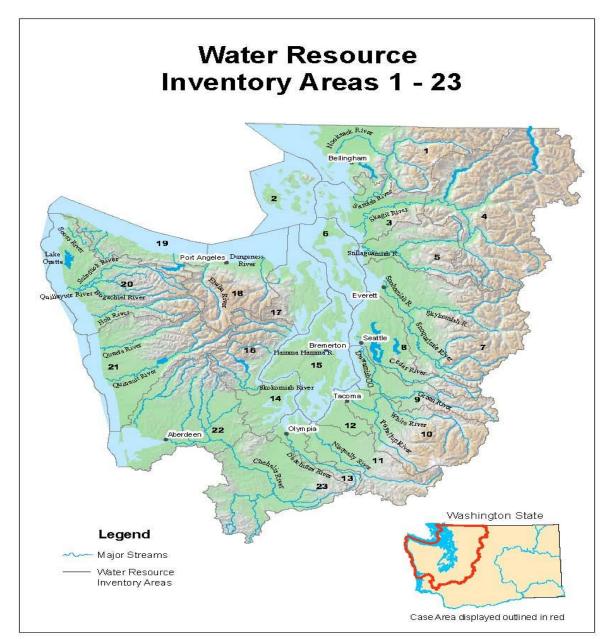


Culverts Case Overview

- Subproceeding of *U.S. v. Washington.*
- Filed February 16, 2001, by U.S. and 21 Tribes.
- Defendant: State of Washington.
- Claim: Treaty right of taking fish imposes on state duty to avoid adverse habitat modifications that reduce number of fish available to tribal fishers. Focus on stateowned culverts that impede fish passage.



Case Area





Culverts Case Overview

- Bifurcated into two phases: Liability and Remedy.
- Liability: August 22, 2007, Summary Judgment Order:

The treaties:

"impose a duty on the State to refrain from building or operating culverts under State maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal Harvest.... [The State of Washington currently owns and operates culverts that violate this duty.]"



Culverts Case Overview

Remedy Phase

- October 2009 Trial.
- June 2010 Closing Argument.
- January 2013 Order directing parties to submit supplemental briefing updating record on status of efforts to fix barrier culverts.
- March 29, 2013, Decision and Injunction.



- Applies to WSDOT, DNR, Parks, and WDFW.
- In consultation with Tribes, prepare lists of all culverts under state-owned roads in Case Area that are salmon barriers as of date of injunction. (Paragraph 2)
- Make ongoing efforts to assess and identify culverts that become salmon barriers after date of injunction. (Paragraph 3)



- New culverts/fish passage constructed by defendants on salmon waters within Case Area must meet injunction's standards. (Paragraph 4)
- Monitor implementation and evaluate effectiveness in meeting injunction's standards.
 Take reasonable steps to maintain culverts to prevent development of fish barriers and to protect salmon habitat. (Paragraph 12)



Injunction Design Standards:

- Fish passage shall pass all species of salmon at all life stages at all flows where the fish would naturally seek fish passage.
- In order of preference, passage shall:
 - 1. Avoid need for roadway to cross the stream;
 - 2. Use a full-span bridge;
 - 3. Use the "stream simulation" methodology.



(Paragraph 9)

<u>Deadlines to Meet Design Standards</u> for culverts on lists:

- WDFW, DNR, Parks: October 31, 2016 (Para 5)
- WSDOT:
 - If 200 lineal meters or more of upstream salmon habitat, March 29, 2030. (Paragraph 6)
 - If less than 200 lineal meters, at end of culvert's useful life, or sooner as part of highway project. (Paragraph 7)



- <u>Deadline to Meet Design Standards</u>—
 Correction within a reasonable period of time required:
 - for corrected culverts that remain salmon barriers or that again become salmon barriers.
 - for newly identified salmon barriers after initial completion of the lists.

(Paragraph 11)



Deferral Option (Paragraph 8):

Provides WSDOT limited ability to defer correction of up to 10% of its aggregate total salmon habitat upstream of Paragraph 6 culverts, provided WSDOT:

- Completes habitat assessments on listed WSDOT barriers; and
- Corrects deferred culverts by end of useful life, or sooner as part of highway project.



Deviation from Standards:

In rare circumstances, may deviate from design standards if Defendants can establish or Parties agree design standards not feasible because of:

- (a) emergency involving immediate threat; or
- (b) extraordinary site conditions.

Defendants must mitigate for any net loss in salmon benefit resulting from deviation. (Paragraph 10)



- Notice: Provide interested Tribes with sufficient notice of barrier inventory, newly identified barrier culverts, and potential or actual correction activities to permit Tribes to monitor and make recommendations for compliance with injunction. (Paragraph 13)
- Continuing Jurisdiction: Court to retain continuing jurisdiction to assure compliance. (Paragraph 14)



Culverts Injunction--Implementation

- Coordination Among WSDOT, WDNR, WDFW, Parks.
- Coordination with Tribes.
- Coordination with Tribal Attorneys.
- Filed with Court Lists of Barrier Culverts— September 27, 2013.



Culverts Litigation--Appeal

- May 28, 2013: State's Notice of Appeal Filed.
- Briefing Expected to be Completed Spring 2014.
- Oral Argument: Estimated Fall 2014.
- Timing of Decision Uncertain.
- No Stay In Effect.
- State Law Requires Fish Passage at Stream Obstructions. RCW 77.57.
- Forest and Fish 10/31/16 Deadline for Forest Roads. WAC 222-24.



Culverts Case Injunction

Questions?

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